BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider Regulated Telecommunications Services Used by Incarcerated People	R. 20-10-002

OPENING BRIEF OF SECURUS TECHNOLOGIES, LLC (U 6888 C) ON THE COMMISSION'S AUTHORITY TO REGULATE RATES, FEES, AND/OR SERVICE QUALITY OF "VIDEO CALLING" AND "RELATED SERVICES"

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SUMMARY

Securus will continue to work cooperatively with the CPUC to develop reasonable regulations that balance the needs of all stakeholders for affordable, accessible, and secure communications. With respect to the specific issues at hand, Securus submits information demonstrating that its video-enabled communications service, Securus Video Connect ("SVC") is, as already classified by the Federal Communications Commission, an information service. SVC and the other information services for which the CPUC has sought legal briefing bring tremendous benefits to incarcerated persons and their loved ones. In the absence of regulatory compulsion or economic regulation, Securus has made substantial investments in these services, which have fueled innovation and product development that have and will continue to benefit both incarcerated consumers and their families, and agency customers.

The implications of the CPUC declaring that it has jurisdiction over these services extend far beyond the relative handful of IPCS providers in the state that are ostensibly the group deemed as most impacted by this rulemaking. The CPUC's determination that two-way video communications, texting, email, and internet access fall within its jurisdiction would have profound consequences for hundreds, if not thousands of companies that are not public utilities and likely are completely unaware that the CPUC is even considering extending its jurisdiction over these services.

Securus, therefore, believes that such an inquiry must be undertaken in a general rulemaking so that affected entities have adequate notice. Closely related, industry-wide issues must be addressed in industry-wide proceedings, and not in a proceeding limited to a given type of service or provider, such as IPCS providers. Securus, thus, urges the CPUC to suspend further consideration of these issues in this proceeding, unless or until it is prepared to undertake and complete a general rulemaking.

If the CPUC decides to reject a general rulemaking process and instead move forward in considering these broad issues in this narrow proceeding, Securus provides the following legal analysis of the agency's authority to regulate the rates and fees associated with video sessions and other services.

First, it is important to note that on the federal level, the Federal Communications Commission ("FCC") has classified all such services as subject to the FCC's policy of non-regulation – in other words, these services have been deemed by the FCC as not subject to public utility regulation.

At the state level in California, the CPUC's statutory authority is generally limited to regulating public utilities. Relevant to this discussion, a public utility is a telephone corporation, which in turn means an entity that manages or operates a "telephone line." A review of the statutory language and key cases interpreting these key terms readily demonstrates that video sessions and other services fall well outside of the CPUC's statutorily defined authority. However well-intentioned, the CPUC cannot act without the authority conferred by the State Constitution and the California Public Utilities Code. Further, even if the CPUC believed it had authority to regulate some or all of these services, such regulation would be preempted under the well-established doctrines of conflict preemption. The FCC has classified video sessions and the other services identified in the *Phase II Scoping Memo* as information services and are therefore exempt from common carrier regulation, such as regulating rates. When, as explained herein, the state's regulation inevitably includes regulating interstate services that the FCC has decided must be free of such regulation, the state's effort must yield.

The CPUC has also asked for briefing on whether it should regulate if it finds it has jurisdiction. As explained herein, the CPUC should not resolve the critical question of its

jurisdiction in the context of this narrow proceeding and, if addressed here, the law plainly demonstrates jurisdiction is lacking. Securus, thus, will not comment on the separate question of whether the CPUC should regulate if it finds it has jurisdiction at this time but reserves the right to address other parties' comments that may address the question.

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Pursuant to the Appendix I of the Phase II Scoping Memo in the above-captioned proceeding, Securus Technologies, LLC (U 6888 C) ("Securus") hereby submits this opening brief on the questions for legal briefing.

I. Introduction and Summary

The California Public Utilities Commission ("CPUC" or "Commission") has requested legal briefing on whether it has authority to set rates, fees, or service quality for what it calls "video calling," including remote and on-site video visitation and "related services." The "related services" include written electronic messaging, such as email and texting, and access to entertainment services such as photo sharing, tablets, music, video entertainment, "and/or internet access services."[1] The CPUC does not define what it means by "video calling," and it is unclear how the other services it lists as "related services" are in fact related to "video calling." Securus offers an application-based video communication service called Securus Video Connect ("SVC") that allows incarcerated persons and their loved ones to establish video sessions. SVC does not enable "calling," it enables a video session. Rather than "video calling," Securus will

[1] *Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People,* Assigned Commissioner's Phase II Scoping Memo and Ruling Extending Statutory Deadline, Rulemaking 20-10-002, at 4, 11, App. 1 (Nov. 29, 2021) (*Phase II Scoping Memo*).

refer to its video-enabled communications service as "SVC" and its use as establishing a "video session." Moreover, rather than use the potentially confusing term, "related services," Securus will refer to texting, email, content delivery, and/or internet access services as "other services."

Securus will continue to work cooperatively with the CPUC to develop reasonable regulations that balance the needs of: (i) incarcerated persons wishing to communicate with their loved ones in the most affordable and accessible manner possible, (ii) prison and jail operators wishing to ensure that such services have the supervision and security necessary in an incarcerated environment, and (iii) incarcerated persons' calling services ("IPCS") providers wishing to receive a reasonable return on investment that allows them to improve, expand, and continue to provide their service offerings. Although Securus has objected to the specific interim IPCS rates recently promulgated by the CPUC based on concerns about both process and the factual data underlying the proposed rates, the company is committed to working with the CPUC to develop IPCS rate caps that are supported by actual cost data, and more broadly to develop legally sustainable and reasonable regulation over calling services. With respect to the specific issues at hand, Securus hopes to provide the CPUC with a comprehensive understanding of its SVC service, how that service is enabled and provided, and the tremendous benefits SVC and its other information services provide to incarcerated persons and their loved ones. In the absence of regulatory compulsion or economic regulation, Securus has made substantial investments in these services, which have fueled innovation and product development that will benefit both incarcerated consumers and their families, and agency customers. With an appropriate regulatory framework, Securus hopes to continue to deploy these services to facilities in California and throughout the country.

With respect to the CPUC's consideration of its authority to cover non-utility services, there are implications that extend far beyond the relative handful of IPCS providers in the state that are ostensibly, the group deemed, as most impacted by this rulemaking. For example, a determination that two-way video communications, texting, email, and internet access fall within the CPUC's jurisdiction would have profound consequences for hundreds if not thousands of companies that are not public utilities and likely are completely unaware that the CPUC is even considering extending its jurisdiction over these services.

If undertaken at all, we believe that such inquiry must be undertaken in a general rulemaking so that affected entities have adequate notice. Closely related, industry-wide issues must be addressed in industry-wide proceedings, and not in a proceeding limited to a given type of service or provider, such as IPCS providers.[2] Securus, thus, urges the CPUC to suspend further consideration of these issues in this proceeding, unless or until it is prepared to undertake and complete a general rulemaking.

If the CPUC decides to reject a general rulemaking process and instead move forward in considering these broad issues in this narrow proceeding, Securus provides the following legal analysis of the CPUC's authority to regulate the rates and fees associated with video sessions and other services.

[2] *Cf.* State of California Public Utilities Commission, Rules of Practice and Procedure: California Code of Regulations, Title 20, Division 1, Chapter 1 § 1.3(f) (2021) ("'Quasi-legislative proceedings' are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry, even if those proceedings have an incidental effect on ratepayer costs."); § 6.1 ("Orders instituting rulemaking shall be served on all known … interested persons.").

First, it is important to note that on the federal level, the Federal Communications Commission ("FCC") has classified all such services as subject to the FCC's policy of non-regulation – in other words, these services have been deemed by the FCC as not subject to public utility regulation.

At the state level in California, the CPUC's statutory authority is limited to regulating public utilities. Relevant to this discussion, a public utility is a telephone corporation, which in turn means an entity that manages or operates a "telephone line." A review of the statutory language and key cases interpreting these key terms readily demonstrates that video sessions and other services fall well outside of the CPUC's statutorily defined authority. However well-intentioned, the CPUC cannot act without the authority conferred by the State Constitution and the California Public Utilities Code. Further, even if the CPUC believed it had authority to regulate some or all of these services, such regulation would be preempted under the well-established doctrines of conflict preemption. The FCC has classified video sessions and the other services identified in the *Phase II Scoping Memo* as information services and are therefore exempt from common carrier regulation, such as regulating rates. When, as explained herein, the state's regulation inevitably includes regulating interstate services that the FCC has decided must be free of such regulation, the state's effort must yield.

The CPUC has also asked for briefing on whether it should regulate if it finds it has jurisdiction. As explained herein, the CPUC should not resolve the critical question of its jurisdiction in the context of this narrow proceeding and, if addressed here, the law plainly demonstrates jurisdiction is lacking. Securus, thus, will not comment at this time on whether the CPUC should exercise its jurisdiction but reserves the right to address other parties' comments that may address that separate question.

II. The CPUC Should Undertake A General Rulemaking to Determine Its Jurisdiction

The CPUC has never asserted jurisdiction over video sessions or other services and doing so would have profound implications extending well beyond the handful of providers offering services for incarcerated persons in California. A finding that video sessions and other services fall within its statutory authority would set a precedent, affecting virtually every communications-related industry in the state from providers of video communications services, such as FaceTime, Skype, Google Duo, or Zoom, to internet companies, internet access service providers, streaming services, and wireless service providers. The CPUC should not undertake such a monumental rulemaking in the context of a narrow proceeding where none of these affected providers are parties.

It is of no consequence that the CPUC might invoke its newfound jurisdiction only over providers of IPCS services. The CPUC cannot regulate the identified services when provided by IPCS providers unless it first determines that those specific services fall within its statutory authority. To regulate IPCS providers' offering of these services first requires the CPUC to conclude that the providers are "telephone corporations" when offering these services, and that these services are "telephone messages" provided over a "telephone line." If it could make those necessary, fundamental determinations, then the proverbial cat is out of the bag because the affected services would be determined to fall within the CPUC's statutory authority. Although this Commission may decide to forgo the exercise of its newfound jurisdiction over the plethora of entities engaged in the provision of these services, there is nothing to stop this or a future Commission later from exercising its authority and imposing common carrier type regulation on Facebook, Microsoft, Google or the host of smaller providers that offer electronic messaging,

access to content, or video chat features. All of these companies would suddenly come within the CPUC's jurisdictional cross-hairs without ever having had notice of, or opportunity to comment on, the fundamental question at issue: whether the CPUC's statutory authority extends to video sessions and other services.

III. Securus' Investment and Innovation in New Technologies Benefits the Incarcerated Community

Securus has invested approximately $50 million each year in technology and broadband infrastructure in order to bring advanced services to incarcerated individuals in California and throughout the country. It has invested $45 million just in the last six months to deploy more than 425,000 tablets to incarcerated individuals. Securus' goal is to provide a tablet to every individual in the facilities it services.

These investments enable video sessions, the exchange of texts, photos, VideoGrams, and access to music, movies, books, law libraries, and educational resources. The ability to see family and friends, not just hear their voices, has helped overcome the disheartening reduction in on-site visitation due to COVID, and it helps shorten the distances for those whose loved ones are incarcerated in distant states. The distribution of tablets has been called a game changer by correctional authorities and the incarcerated. The investment and innovation required to deploy these services grew out of competition between providers to differentiate their products by offering the best possible suite of services. Correctional agencies increasingly require these services in their requests for proposal.

Tablets are not simply an entertainment delivery system; they have replaced unproductive idle time with vast new opportunities for education and vocational advancement. As stated by Kendall County, Texas Sheriff Dwight Baird after Securus deployed tablets at their facility, "[t]he incarcerated individuals have time on their hands. With the educational, job search and

mental health content available on the community tablets, they can put that time to constructive use."[3] Studies confirm the positive effect that increase education opportunities provide in reducing recidivism.[4] A significant number of incarcerated persons lack a high school diploma. The ability to access educational resources through tablets is helping incarcerated individuals obtain GEDs, enhancing their job prospects upon release. For those with a high school diploma, tablets substantially assist access to college courses and obtainment of advanced degrees.

More than 600,000 educational videos have been downloaded to Securus' tablets, covering topics ranging from math and science to basic job skills. Providing these opportunities to incarcerated individuals is extremely valuable, as research has shown that people who receive an education while incarcerated are less likely to reoffend and those receiving an advanced degree are more than 40 percent less likely to reoffend.

The tablets for incarcerated individuals have also had a positive impact on the jail environment in another way. Sheriff Baird states that the tablets have exceeded expectations by helping to lower the noise in the facility and also help drastically reduce inmate-on-inmate violence. According to Sheriff Baird, incarcerated persons "look at a tablet as a work environment. It grants them opportunities, so they don't feel helpless or jealous of one another."[5] The tablets can be an escape from negativity. As stated by an incarcerated person at the Kendall County facility regarding access to the tablets, "you're going into your own world to prevent physical altercations. And in my case, I also love to learn. The tablets take me away from TV

[3] Aventiv Technologies, Community Tablet Helps Incarcerated Individual Prepare for Success, para. 3 (Feb. 10, 2020) ("Aventiv 2020 Press Release"), https://www.aventiv.com/community-tablet-helps-incarcerated-individual-prepare-for-success/.
[4] A 2013 Rand Study entitled "Evaluating the Effectiveness of Correctional Education" found that educational opportunities significantly reduced recidivism. Lois M. Davis et al., Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults (RAND Corporation, 2013).
[5] Aventiv 2020 Press Release para. 14.

life, card games, defiance and arguments."[6] Striking a similar note, New York Department of Corrections Acting Commissioner Anthony J. Annucci said, "[a]ccess to loved ones, educational opportunities and creative expression are paramount to the rehabilitation of New York State's incarcerated individuals, and we are proud to have joined the growing list of correctional systems across the country utilizing this technology. The [Securus] tablets have not only made our facilities safer by reducing idle time, but they have helped countless individuals strengthen family bonds by staying connected with loved ones in a modern, secure way."[7]

Since the full implementation of the tablet and kiosk program at the New York State Department of Corrections, approximately 325,000 secure messages have been exchanged. Additionally, more than 10,000 VideoGrams have been sent by family and friends, providing incarcerated loved ones with 30-second videos of special moments such as a child's first step, college graduation and the father/daughter dance at a wedding. The deployment of video communications technology has enabled Securus to offer Video Relay Service ("VRS") to deaf incarcerated persons. Securus offers VRS in all of the facilities in which it has deployed video capabilities.

These capabilities have also required investment in the broadband infrastructure over which these services are delivered. The infrastructure investment includes not only deploying fiber to the facility, but also deploying secure networks within the facility, such as Wi-Fi, that enable the use of individual tablets. Broadband networks differ substantially from traditional circuit-switched networks not only in terms of speed and bandwidth, but also the functionalities

[6] Aventiv 2020 Press Release para. 15.
[7] Aventiv Technologies, JPay and New York State Department of Corrections and Community Supervision Celebrate the Successful Launch of 43,000 Free Digital Tablets in the Hands of Incarcerated New Yorkers, para. 6 (Nov. 20, 2019) ("Aventiv 2019 Press Release"), https://www.aventiv.com/jpay-and-new-york-state-department-of-corrections-and-community-supervision-celebrate-the-successful-launch-of-43000-free-digital-tablets-in-the-hands-of-incarcerated-new-yorkers/.

that they enable. Securus' investment also entails the use of data centers to house the servers that host the educational and entertainment content delivered to tablets, as well as the sophisticated recording and monitoring capabilities that facilities require as an integral component of video sessions.

These services are the result of market forces that have spurred competition, which in turn has driven the innovation and investment necessary for the deployment of these highly valued services. The fostering and preservation of this kind of market dynamic has led the FCC, and the states, to refrain from imposing economic regulation on advanced communications service lest it chill the incentives needed to sustain these investments. The CPUC should exercise similar restraint.

IV. History of Non-Regulation of Information Services to Promote Investment and Competition

For decades, policy at the federal and state level has entailed a light-touch regulatory approach to information services. As data processing services began to proliferate in the 1960s, the FCC confronted the issue of how to regulate these services, which relied on the telephone lines of the incumbent, government-sanctioned telephone monopolies, such as AT&T, to move computer-based information from one place to another.[8] In the *Computer Inquiry* line of cases, the FCC created a framework that distinguished between the new computer-based services, which it labelled "enhanced services," and the underlying transmission services, which the CPUC called "basic service." Basic service is the "offering of a 'pure transmission path that is

[8] *People of State of Cal. v. FCC*, 905 F.2d 1217, 1223-30 (9th Cir. 1990) (*California I)* (providing a comprehensive history of the FCC *Computer Inquiry* cases); *Computer and Comm. Industry Ass'n v. FCC*, 693 F.2d 198, 203-206 (D.C. Cir. 1982) (*CCIA*) (sustaining the FCC's *Computer II* framework).

virtually transparent in terms of its interaction with customer supplied information.'"[9] An enhanced service combines the underlying basic transmission service "with 'computer processing applications [that] …act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.'"[10]

To promote competition and innovation, the FCC settled on a policy of non-regulation of the enhanced services even though they were combined with basic transmission services.[11] Instead of regulation, the FCC determined that competitive market forces would better protect the public interest, a decision that was upheld by the D.C. Circuit Court of Appeals.[12] As the FCC explained, the *Computer II* framework "foster[ed] a regulatory environment conducive to . . . the provision of new and innovative communications-related offerings" that "enabl[ed] the communications user to [take] advantage of the ever increasing market applications of computer . . . technology."[13] The FCC found that regulating enhanced services like common carrier offerings, "would only restrict innovation in a fast-moving and competitive market."[14] Basic

[9] *California I*, 905 F.2d at 1223, n.3 (quoting *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision,* 77 FCC 2d 384, 420 (1980) (*Computer II Final Decision*)).
[10] *Id.* (quoting *Computer II Final Decision,* 77 F.C.C.2d at 387). An early example of an enhanced service was AT&T's offering of "Dial It" service, which allowed subscribers to call a certain number and access stored information such as sports scores. *CCIA*, 693 F.2d at 205, n.18. In addition to deciding not to impose Title II rate regulation on enhanced services, the FCC discontinued rate regulation of customer premises equipment (CPE), such as telephones and "sophisticated home computer terminals," and ordered CPE be de-tariffed and sold separately from transmission service. *CCIA,* 693 F.2d at 205, 208.
[11] *CCIA,* 693 F.2d at 207, 209.
[12] *Id.* at 207.
[13] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11512, ¶ 23 (1998) (*Stevens Report*) (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations* (Computer II), Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d at 389-90 (1979)).
[14] *Stevens Report*, 13 FCC Rcd at 11513, ¶ 26.

service, on the other hand, would continue to be regulated under Title II of the Communications Act, which authorizes the FCC to regulate interstate common carrier service.[15]

The dichotomy between unregulated enhanced services and regulated basic services was incorporated into the Communications Act by the 1996 Telecommunications Act, which distinguishes between unregulated "information services" and regulated "telecommunications services." Both telecommunications services and information services utilize "telecommunications," which, much like basic service is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[16] When telecommunications is offered to the public for a fee, it is regulated "telecommunication service."[17] Information service, on the other hand, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via *telecommunications.*"[18] The categories of information services and telecommunications services are mutually exclusive.

The FCC has ruled that all services that were enhanced services fall within the statutory definition of information services.[19] And, like enhanced services, information services are "exempted from common carriage status and, hence, Title II regulation."[20] As stated in *Mozilla,* having been classified as an information service, the service is taken out of Title II and placed

[15] *See* 47 U.S.C. § 201(a).
[16] *Id.* at § 153(50).
[17] *Id*. at § 153(51) (emphasis added) (defining telecommunications service as the "offering of *telecommunications* for a fee directly to the public, or such classes of users as to be effectively available directly to the public, regardless of facilities used.")
[18] *Id.* at § 153(24) (emphasis added).
[19] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955, ¶ 102 (1996) (*Non-Accounting Safeguards Order*).
[20] *Mozilla Corp. v. FCC*, 940 F.3d 1, 11 (D.C. Cir. 2019).

within Title I of the Communications Act, which established the FCC and the scope of its jurisdiction.

The information service classification reflects an affirmative decision by the FCC to not impose common carrier regulation on the service. Subjecting information services to rate regulation or other forms of Title II regulation would "seriously curtail the regulatory freedom that the [FCC] concluded in *Computer II* was important to the healthy and competitive development of the enhanced serviced industry."[21] The FCC in fact has "long recognized that regulatory burdens and uncertainty . . . can deter investment by regulated entities."[22] The robust history of excluding rate regulation and other forms of economic, utility-type regulation on video sessions and other services sets the background for the CPUC's determinations. This history confirms that the imposition of common carriage regulation over video sessions and other services threatens the continued healthy development and deployment of these highly valued services.

V. Video Sessions and Other Services Are Information Services

There is no question that services that enable video sessions and the other services described in the Scoping Memo are information services based on the FCC's determinations of the features and functions they enable.

A. Securus' Video Connect Service Qualifies as Information Services

1. The FCC Has Classified Video Sessions As Information Services

Although using different terminology, such as video conferencing or two-way interactive video services, the FCC has repeatedly identified services enabling two-way video sessions as

[21] *Stevens Report*, 13 FCC Rcd at 11524, ¶ 46.
[22] *Mozilla*, 940 F.3d at 50 (quoting *Restoring Internet Freedom,* WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 88 (2018))

information services, or its predecessor enhanced service.[23] The FCC's classification was confirmed by the D.C. Circuit's rejection of the FCC's previous effort to require IPCS providers to submit data on video visitation services.[24] The court specifically disagreed with the FCC's assertion that "whether or not video visitation services are a form of ICS, they are still subject to the FCC's jurisdiction."[25] Before it may impose reporting requirements, the court wrote, the FCC must explain how its statutory authority to regulate telecommunications services or ICS under Title II extends to video visitation services, which the FCC failed to do.[26] The FCC has yet to offer such an explanation and it plainly views video visitation services as outside of its authority to regulate rates for communications services to correctional facilities.[27]

Yet further confirmation that video sessions are information services is found in the Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260, ("CVAA"). The CVAA is designed to enhance access by disabled persons to "advanced communications services," a specifically defined term in the CVAA. The CVAA has been incorporated into the Communications Act. The CVAA defines advanced communications services to include "interoperable video conference service," which in turn is defined as "a

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[23] *See e.g., Framework for Broadband Internet Services*, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 107 (2010) (including video conferencing in the list of information services along with e-mail hosting, web-based content, voicemail, and cloud computing); 47 U.S.C. § 271(g)(2) ("two-way interactive video services . . . to or for elementary and secondary schools" are examples of advanced telecommunications and information services.); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, 24394, ¶ 205 (1998) (identifying video conferencing as an enhanced service). The FCC has also found that services that enable video teleconferencing between end points using different protocols was an enhanced service. *American Telephone And Telegraph Company Comparably Efficient Interconnection Plan for Codec Conversion Service*, Memorandum Opinion and Order, 3 FCC Rcd 4683, ¶¶ 3-4 (1988).
[24] *Global Tel*Link v. FCC*, 866 F.3d 397, 415 (D.C. Cir. 2017) (*GTL*).
[25] *Id.*
[26] *Id.*
[27] *See, Rates for Interstate Inmate Calling Services,* WC Docket No. 12-375, Order, DA 22-52 (rel. Jan. 18, 2022) (citing *GTL* to once again decline to require reporting data for "video calling services" and noting the FCC "has not reached this question on remand").

service that provides real-time video communications, including audio, to enable users to share information of the user's choosing."[28] In its implementation of the CVAA, the FCC found that interoperable video conferencing services may be provided over devices, such as smart phones, tablets, or laptops, that enable access to other services. In other words, just because the service is accessed over a smart phone does not negate its classification as an advanced communications service. Video sessions fall within the definition of interoperable video conferencing services and, thus, qualify as "advanced communications services."

2. Securus' Video Sessions Have the Attributes of an Information Service

The FCC's classification of services that enable video sessions as an information service is plainly correct. Securus's web-based video service, SVC, is far different from its standard VoIP-based IPCS and bears the hallmarks of an information service. SVC enables incarcerated persons to have a video session with a loved one virtually anywhere in which the remote party has a Wi-Fi or cellular data connection. To utilize SVC, the remote party must first install Securus-provided free software on their device: a computer, laptop or smartphone. This software creates an application, just like FaceTime or Google Duo, that enables the establishment of the video and audio streamed connection. The camera and functions native to the remote party's device must be synchronized with the equipment and software at the facility. SVC utilizes special kiosks at the facility. At one facility, Securus has also started to provide SVC using its

[28] 47 U.S.C. § 153(1), § 153(27). *See also Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.,* CG Docket No. 10-213 et al., Report and Order and Further Notice of Proposed Rulemaking,26 FCC Rcd 14557, ¶¶ 46-51 (2011) (implementing the CVAA). The CVAA also includes within the definition of advanced communications services interconnected and non-interconnected VoIP service and electronic messaging service.

tablets. A video session must be scheduled in advance due to the limited number of video-enabled kiosks deployed at the facilities.

To initiate the video session, the remote party must send an IP address to Securus in order to enable the connection. Once a video session is initiated, Securus' equipment and software at the facility utilizes YUV encoding and a codec called H.264 to compress the video signal and another codec to compress the audio stream. Securus then utilizes other software to encrypt both the video and audio components. Securus' service must then uncompress and decrypt the video and audio packets to enable viewing and listening on the remote party's device. Securus' service, thus, acts on the content by compressing and encrypting the video and audio signals.

Moreover, the remote party's device likely utilizes different codecs native to the operating system running their device. Windows uses RGB24, MAC and iOS use BGRA, while Android devices use NV21. The Securus service must, thus, convert the video signal from one codec to another. Codec conversion (or protocol conversion) has long been a hallmark of an information service.[29] Just this type of protocol conversion led the FCC to treat AT&T's video teleconferencing application to be an enhanced service subject to certain *Computer III* safeguards.[30]

SVC service also bundles a number of features offering information service capabilities. Securus' application includes the ability: (1) of loved ones to view a schedule of upcoming video sessions; (2) to synchronize the details of an upcoming video session with the remote party's online calendar, such as Outlook; (3) to receive notifications regarding upcoming video sessions;

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[29] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956-57, ¶¶ 104-105.

[30] *American Telephone And Telegraph Company Comparably Efficient Interconnection Plan for Codec Conversion Service*, Memorandum Opinion and Order, 3 FCC Rcd 4683, ¶ 3 (1988) (describing a service that enables a video call "when the picture processor equipment (a "coder-decoder or codec) located at the originating customer location uses protocols that are incompatible with those utilized by the codec at the terminating customer location.").

and (4) to run tests of their Wi-Fi or cellular data connections to assess video quality.[31] These features go far beyond simply enabling the bare transmission of a signal between two points.

Also integral to the Securus' video offering is the storage and retrieval function that facilities require before providing the capability to incarcerated persons. An information service classification is determined through a combination of technical functionalities and the customer's perception of the offering, either as an integrated information service, such as texting, or as separable transmission and information functionalities.[32] Here, the customer is the correctional facility. From the facility's perspective, they are receiving an integrated offering that enables video communication and the ability to monitor, record, access, store, and retrieve the video session. Storage and retrieval are key information service criteria. Since the facility would not offer incarcerated individuals the ability to engage in a video call without the recording and retrieval functionalities and because they would view those functionalities as integral and "inextricably intertwined" with the transmission of the video signal, the video as a whole qualifies as an information service. In other words, the facility is not buying simply the capability to transmit video signals but an information service that enables a suite of sophisticated storage and retrieval functionalities.

B. "Other Services" Are Information Services

The FCC has also determined that electronic messaging such as texting, email, and internet access services are information services.[33] The *Stevens Report* classified email as an

[31] *See* Securus App, https://securustech.net/mobile/index.html (last visited Jan. 27, 2022)
[32] *Nat'l. Cable & Telecom. Ass'n v. Brand X Internet Services,* 545 U.S. 967, 990-92 (2005).
[33] *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (classifying broadband internet access service as an information service), *aff'd in relevant part*, *Mozilla Corp v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, WT Docket No. 08-7, Declaratory Ruling, 33 FCC Rcd 12075, 12082-83 (2018) (*Texting Order*) (classifying short message service (SMS) and

information service because it "utilizes data storage as a key feature of the service offering."[34] More recently, the FCC determined that wireless messaging services, particularly Short Message Service ("SMS") and Multimedia Messaging Service ("MMS"), are information services because they "provide the capability for 'storing' and 'retrieving' information" as well the capability to pull information, such as weather and sports, from servers and the capability of modifying and transforming information."[35] Additionally, the FCC concluded that these information service capabilities are "inextricably intertwined" with the underlying transmission component resulting in an integrated information service offering as evidenced by consumer perception of the product and its technical characteristics.[36]

In light of the FCC's information services classification of texting service, the CPUC "decline[d] to include text messaging services among the services" subject to contribution to the state's universal service funds.[37] The CPUC's determination to not extend contribution requirements was clearly influenced by the FCC's decision to classify texting as an information service. Prior to the FCC's determination, the CPUC had issued a preliminary order imposing contribution requirements on texting because it was considered "unclassified." Once classified as an information service by the FCC, the CPUC changed course.

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multimedia messaging service (MMS), commonly referred to as texting, as information services); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11539 (1998) (*Stevens Report*) (classifying email as an information service).

[34] *Stevens Report*, 13 FCC Rcd at 11538-39, ¶ 78.

[35] *Texting Order,* 33 FCC Rcd at 12082-85, ¶¶ 19-23 (describing the manner by which texting offers the various capabilities of information services).

[36] *Id.* at 12085-86, ¶¶ 24-26.

[37] *Order Instituting Rulemaking to Consider Whether Text Messaging Services Are Subject to Public Purpose Program Surcharges*, Decision Determining that Public Purpose Program Surcharges and Fees Will Not be Assessed on Text Messaging Services Revenue, D.19-01-029, at 17 (Jan. 31, 2019). The CPUC order did not assess whether texting involved operating a telephone line.

Finally, the FCC has once again classified Broadband Internet Access Service ("BIAS") as an information service, a finding upheld by the D.C. Circuit in *Mozilla.* The court found that classifying BIAS based on the functionalities of DNS and caching were a reasonable policy choice, particularly in light of the Supreme Court's *Brand X* decision upholding the FCC's earlier decision, finding that a cable modem service was not a telecommunications service.[38] The court also found that the FCC's determination that Title II "public utility" style regulation of BIAS reduced investment was supported by substantial evidence.[39]

VI. The CPUC's Authority Does Not Extend to Video Sessions and Other Services

A. The CPUC's Statutory Authority

The California Constitution and the California Public Utilities Code delegate authority to the CPUC to regulate "public utilities." Section 3 of Article 12 of the California Constitution provides that "[p]rivate corporations and persons that own, operate, control, or manage a line, plant, or system for … the transmission of telephone . . . messages … and common carriers, are public utilities subject to control by the Legislature." Section 6, Article 12 states that the CPUC "may fix rates . . . for all public utilities subject to its jurisdiction." Pub. Util. Code, § 216, subd. (b), in turn, provides that "[w]henever any . . . telephone corporation . . . performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that . . . telephone corporation . . . is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part."

Pub. Util. Code Section 234 defines "telephone corporation" as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within

[38] *Mozilla*, 940 F.3d at 20 (citing *Nat'l. Cable & Telecom. Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005)).
[39] *Id.* at 49-50.

this state."[40] Section 233 in turn, defines "a telephone line" to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."[41] The code does not define "telephone."

The California Supreme Court addressed the scope of these key terms in *Commercial Comm. Inc. v. Pub. Util. Comm,* 50 Cal 2d. 512 (1958) (en banc) ("*Commercial Comm.*"). The court first noted that the term "telephone" was not defined. In the absence of a statutory definition, the court turned to dictionary definitions of "telephone":

> It is defined in Webster's New International Dictionary, 2d edition as "An instrument for reproducing sounds, especially articulate speech, at a distance." In defining "telephony"' the Encyclopedia Britannica (1954 ed.) states "In a broad sense the term telephone or telephony includes the entire art of *speech transmission* with the many accessories and operating methods which research, development and invention have supplied to facilitate and extend conversation at a distance by electrical means . . . . [I]n telephony "one may carry on a two-way communication by speaking as well as by listening . . . ."[42]

The court further concluded that, in determining whether a company is "offering a telephone service, it appears to be basic that what a telephone company actually provides and maintains is the facilities for the transmission of telephone messages, or for communication by telephone."[43] The court distinguished "telephony" from radio broadcasting, which it found "more akin to that of music halls, theatres and newspapers."[44]

Commercial Comm. remains a central precedent for the interpretation of these key terms. More than 45 years later, in *City of Huntington Beach v. Pub. Utilities Com.*, 154 Cal. Rptr. 3d

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[40] Cal. Pub. Util. Code § 234(a).
[41] Cal. Pub. Util. Code § 233.
[42] *Commercial Comm.*, 50 Cal. 2d at 522 (emphasis added).
[43] *Id.* at 522-23.
[44] *Id.*

241 (2013) ("*Huntington Beach*"), a California appeals court addressed the question of whether a wholesale fiber optics company that sold capacity to wireless and wireline companies was a telephone corporation. The city claimed that the company was a wireless provider and outside the scope of a telephone corporation. Relying heavily on *Commercial Comm.*, the court wrote: "The word 'telephone' is not defined in the Public Utilities Code, but 'telephony' is generally understood as a 'two-way communication by speaking as well as listening at a distance.'"[45]

In 2020, the CPUC heavily relied on the holding in *Huntington Beach* to conclude that VoIP landline providers are "telephone corporations" within the meaning of Sections 233 and 234.[46] VoIP landline providers argued that in order to be a "telephone corporation," an entity must provide traditional telephone service, "i.e., telephone service provided over the public switch telephone network."[47] The CPUC rejected this argument. In doing so, the CPUC cited to *Huntington Beach's* holding and said the phrase "facilitate communication by telephone" under Section 233 encompasses services beyond traditional landline services if the service facilitates "two-way communication by speaking as well as by listening," regardless of the "exact form or shape of the transmitter and the receiver or the medium over which the communication can be effected."[48]

Under this controlling judicial precedent, the CPUC's jurisdiction is limited to offerings by companies that enable the ability to speak and listen over a distance.

[45] *Huntington Beach*, 154 Cal. Rptr. 3d at 256 (quoting *Commercial Comm.*).
[46] *Order Instituting Rulemaking Regarding Emergency Disaster Relief Program*, Order Modifying Decision D.19-08-025, and Denying Rehearing of Decision, as Modified, D.20-09-012 at 32-37 (Sept. 10, 2020) (*Phase I Emergency Order*).
[47] *Id.* at 35.
[48] *Id.* (citing *Huntington Beach,* 154 Cal. Rptr. 3d at 585-86).

B. The CPUC's Statutory Authority Does Not Extend to Video Sessions and Other Services

To the best of Securus' knowledge, no regulatory authority at the federal or state level, including California, has sought to impose rate regulation on video sessions, electronic messaging services, or, with one exception that was preempted, internet access services or content delivery services.[49] The CPUC has never before sought to assert jurisdiction for any purpose, let alone rate regulation, for any service that does not involve the use of what commonly would be considered a telephone for purposes of enabling speaking and listening at distance.[50]

Whatever the CPUC's policy preferences, the legislature has not conferred authority on the agency to regulate these services. As the California Supreme Court in *Commercial Comm.* aptly summarized, "the powers of regulation conferred upon the commission by the Legislature must be cognate and germane to the regulation of . . . public utility telephone companies."[51] That an entity may be a public utility telephone company when operating a "telephone line" to provide some regulated services, such as IPCS, does not confer jurisdiction to regulate that entity's services that extend beyond the "transmission of telephone messages or for telephone communication," even if provided over the same facilities.[52] The CPUC's authority is, thus, limited to regulating services that enable speaking and listening at a distance.

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[49] As discussed in the preemption section below, New York sought to require internet access service providers to offer a low-cost service. This effort at rate setting was preempted.

[50] In the *Phase I Emergency Order*, the CPUC noted that the VoIP Coalition's rehearing application did "not state what device, if not a telephone, customers use when they utilize VoIP service to communicate. If a mobile phone is a 'telephone' for purposes of Section 233, then based on the *City of Huntington Beach* Court's analysis, *a VoIP telephone* would also be one." *Id.* at 37, n.140 (emphasis added).

[51] *Commercial Comm.*, 50 Cal 2d at 520.

[52] *See Peterson v. Verizon California, Inc. et al., Decision Granting Motions to Dismiss for Lack of Jurisdiction*, D.13-12-005 (Dec. 5, 2013) (*2013 DSL Order*) (finding that the CPUC does not have jurisdiction over "information services even if the providers also provide 'communications service' that are subject to state regulation.").

Video sessions and other services extend well beyond enabling speaking and listening at a distance. Electronic messaging in the form of texts or emails do not involve speaking or listening at all.[53] There is no provision in the statute that authorizes the CPUC to exercise authority over the transmission or pure writings, photos, or non-speech content enabled by SMS or MMS. Authority is also lacking over the internet access services or services used for the one-way delivery of movies, music, books, and educational materials enabled through tablets. These services obviously do not enable two-way communication for speaking and listening. Instead, they more closely resemble the one-way delivery of content capability prevalent when the California Supreme Court ruled in *Commercial Comm.*, radio broadcasting, which the court found was more like "music halls, theaters, and newspapers" and, thus, outside the CPUC's statutory authority.[54]

Nor does the CPUC have authority to regulate video sessions. Although the audio component of a video session enables speaking and listening, that aspect of the service is inseparable from the simultaneous generation of the video component of the call. The CPUC's statutory authority over telephone corporations nowhere states that the agency has authority over the transmission of video signals.

C. The CPUC Has Consistently Stated that it Lacks Jurisdiction Over Information Services

Apart from the restrictions inherent in the statutory language, the CPUC has long acknowledged that it does not have the authority to regulate information services. As described above, video sessions and other services, are all information services. The CPUC clearly

[53] To the extent texting is considered a wireless service, the CPUC's authority to set rates is barred by the Communications Act, which precludes states from regulating the "rates charged by any commercial mobile service or private mobile service." 47 U.S.C. § 332(c)(3).
[54] It is also telling that the California Internet Consumer Protection and Net Neutrality Act of 2018 conferred no authority on the CPUC to regulate internet access services. *See* S.B. 822, (Cal. 2018).

articulated its lack of authority in a 2013 decision summarily dismissing a consumer's complaint regarding DSL-based internet access service, then classified as an information service by the FCC. The CPUC wrote:

> It is well-established that internet access service is classified for state and federal regulatory purposes as an 'information' service and that state commissions such as the California Public Utilities Commission *do not have jurisdiction* over information services even if the providers also provide 'communications services' that are subject to state regulation. Such is the case here. Both defendants provide traditional telephone service that is subject to the jurisdiction of this Commission as well as DSL service that is not subject to our jurisdiction. Accordingly, the complaint is dismissed.[55]

The CPUC's lack of authority over services classified as information services was more recently restated in former Commissioner Peterman's proposed decision regarding the CPUC's jurisdiction to assess surcharges on texting services to support the state's Public Purpose Programs. Commissioner Peterman wrote that, notwithstanding broadly worded statutory authority, "the Commission has long recognized that its ability to fulfill its legislative intent is often limited by its lack of jurisdiction over advanced services, which are often classified as information services under the [Communications] Act or otherwise exist in unregulated markets."[56] The *Proposed Decision* confirmed that "[t]he Commission's jurisdiction over communications services does not, and has not extended to 'information services'. . . ."[57]

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[55] *2013 DSL Order,* D.13-12-005 (emphasis added); *see also Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities*, Decision Issuing Revised General Order 168, D.06-03-013 at A-4 (March 2, 2006) ("Also the federal government has found that all enhanced or information services (in layman's terms, services relating to the Internet) are not subject to Title II common carrier regulations and, as a result, are broadly exempt from state communications regulations.").

[56] *Proposed Decision Determining Text Messaging Services Revenue Should Be Subject to Public Purpose Program Surcharges and User Fees,* Rulemaking 17-06-023, at 31 (Nov. 9, 2018) (*Proposed Decision*).

[57] *Id.* at 32.

The *Proposed Decision* went on to conclude that texting services had not, at that point, been classified as an information service by the FCC, and that the CPUC could assess surcharges on texting because it was "unclassified." Demonstrating the point about the jurisdictional limitation on information services, Commissioner Peterman withdrew the *Proposed Decision*, and the CPUC reversed course once the FCC classified texting as an information service. The CPUC declined to include text messaging among the services subject to surcharges in light of the FCC's finding that classifying text messaging as in information service "was in the public interest on the basis of protecting customers from unwanted text messages *and promoting innovation and investment in text messaging.*"[58]

In sum, the CPUC's statutory authority over telephone corporations by its terms does not extend to video sessions or other services and, as the CPUC has repeatedly acknowledged, it has no jurisdiction to impose rate regulation or other common carrier obligations over information services. Even if it determines that it somehow has jurisdiction over these services, the CPUC's authority would be preempted, as discussed in the following section.

VII. Federal Law Preempts the CPUC From Regulating Video Sessions and Other Services

A. Ninth Circuit Precedent on Preemption of State Laws that Negate the FCC's Deregulatory Policies Regarding Enhanced Services

Under the Supremacy Clause, state laws that conflict with federal laws, including federal regulations, are preempted.[59] Preemption may be express or implied. Express preemption occurs

[58] *Order Instituting Rulemaking to Consider Whether Text Messaging Services are Subject to Public Purpose Program Surcharges*, Decision Determining That Public Purpose Program Surcharges and User Fees Will Not Be Assessed on Text Messaging Services Revenue, D.19-01-029, at 17 (Jan. 31, 2019) (emphasis added).

[59] *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.* 485 U.S. 495 (1988); *Close v. Sotheby's, Inc.*, 909 F.3d 1204 (9th Cir. 2018).

when Congress "expressly confers upon the agency the authority to preempt."[60] Section 253(d) of the Communications Act is an example of express preemption. It provides that the FCC "shall preempt the enforcement of [a state or local] statute, regulation or legal requirement" that prohibits or has the effect of prohibiting a carrier to provide interstate or intrastate service.[61] Preemption however may also be implied by a regulatory framework, including a framework of non-regulation. A state law or regulation may be impliedly preempted if "compliance with both state and federal law is impossible" (the impossibility doctrine) or if the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (conflict preemption).[62]

Controlling precedent in the Ninth Circuit has long held that state regulations that undermine the FCC's regulatory regime over information services cannot stand.[63] *California II* is the seminal case. That case upheld the FCC's revised policy regarding the provision of enhanced services by the Bell Operating Companies.[64] In *Computer II*, the FCC had required these companies to provide enhanced services through a structurally separate affiliate. Finding that by allowing these companies to provide enhanced services on an integrated fashion better served the public interest, the FCC eliminated the structural separation requirement and adopted other safeguards to protect competition. To effectuate this policy, the FCC also preempted state rules that continued to require that these companies offer enhanced services through structurally

[60] *Mozilla Corp. v. FCC*, 940 F.3d 1, 75 (D.C. Cir. 2019).
[61] 47 U.S.C. § 253(d).
[62] *Oneok, Inc. v. Learjet, Inc.,* 575 U.S. 373, 377 (2015).
[63] *People of State of Cal. v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California II*); *see also Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("any state regulation of an information service conflicts with federal policy of non-regulation" and is therefore preempted) *cert. denied sub nom. Lipschultz v. Charter Advanced Servs. (MN), LLC*, 140 S. Ct. 6 (2019).
[64] In an earlier opinion, the Ninth Circuit had ruled that the FCC had not sufficiently demonstrated that the safeguards the agency established in lieu of structural separation would adequately protect competitors. *People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*).

separate affiliates. Specifically, the FCC applied the impossibility doctrine to preempt state rules requiring structural separation of facilities and personnel used to provide jurisdictionally mixed enhanced services. The FCC declined to preempt state requirements that applied to purely intrastate services.[65]

California II sustained the FCC's preemption. It first explained that the Communications Act confers authority on the FCC to regulate interstate services but denies the agency authority to regulate intrastate communications.[66] The court explained that "the only limitation on a state's authority over intrastate telephone service is 'when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication.'"[67] Before analyzing the scope of preemption, the court made a critical ruling. It rejected arguments that the FCC could preempt states only when exercising its authority under Title II of the Act, and that the FCC had no authority to preempt in order to effectuate the goals of Title I. Enhanced services are subject to Title I, not Title II. The court instead held that Title I confers jurisdiction on the FCC to preempt inconsistent state law.[68] The importance of this holding is that it conflicts with the contrary finding by the D.C. Circuit in *Mozilla* that Title I does not confer authority to preempt state laws. The law in the Ninth Circuit, thus, stands in sharp contrast to *Mozilla's* cramped view of FCC's preemption authority.

Having concluded that the FCC has jurisdiction to preempt, the court went on to conclude that the FCC had appropriately applied the impossibility doctrine and tailored its preemption to bar state requirements that effectively would require the Bell companies to comply with state structural separation requirements, even for jurisdictionally mixed services. The effect of the

[65] *California II*, 39 F.3d at 932.
[66] *Id.* at 931 (citing 47 U.S.C. § 151 and § 152(b)(1)).
[67] *Id.* (quoting *California I,* 905 F.2d at 1243.)
[68] *Id.* at 932.

state laws, thus, directly undermined the FCC's policy because "enhanced service providers would separate their facilities for services that are offered both interstate and intrastate, thereby essentially negating the FCC's goal of allowing integrated provision of enhanced and basic services."[69]

B. State Rate Regulation of Video Sessions and Other Services Is Preempted by the FCC's Policy of Non-regulation Of Information Services

The CPUC's imposition of rate caps on video sessions and other services would conflict with the federal policy to exempt interstate information services from rate regulation or other forms of common carriage regulation. It is practicably and economically impossible to separate intrastate from interstate offerings of these services. Regulation of video sessions or other services would inevitably result in the CPUC imposing rates on the interstate portions of these services negating the FCC's policy of exempting these services from common carrier regulation.

The FCC has already invoked the impossibility doctrine to preempt inconsistent state regulation of jurisdictionally mixed ancillary services and jurisdictionally indeterminate IPCS.[70] Citing "decades of precedent" that authorize the FCC to regulate jurisdictionally mixed services where the criteria of the impossibility doctrine are met, the FCC preempted inconsistent state rate regulation over various ancillary services that could not be segregated into intrastate and interstate components.[71] The *2021 ICS Order* further clarified that the jurisdiction of an IPCS

[69] *Id.*; *see also id.* at 933 ("The [Bell Operating Companies] would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services, thereby defeating the FCC's more permissive policy of integration.").
[70] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 8485, 8495-96, ¶¶ 29-32 (2020) (*Remand Order*).
[71] *Id.* The FCC identified the criteria for invoking the impossibility doctrine as follows: (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate matters. *Id.* at 8496, ¶ 30.

call would be based on the physical end points of the call, which may be impracticable to determine for calls to wireless devices.[72] If an IPCS provider is unable to definitively determine that a call is intrastate, the FCC requires the provider to treat the call as interstate and the FCC preempted state rates that exceeded the FCC's caps for jurisdictionally indeterminant calls.[73] The CPUC acknowledged the FCC's preemption of indeterminate ICS traffic in its interim decision in this proceeding.[74] As it did with respect to nomadic VoIP service in its *Vonage Order*, "the [FCC] responded to the difficulty of directly determining the jurisdiction of calls by broadly preempting the state's attempted regulation of the service at issue," and the FCC preempted state regulation of ICS that has "an effect on interstate services.'[75]

Video sessions, like IPCS calls, can be received from anywhere and, thus, cannot practicably be separated into their interstate or intrastate components. Any attempt by the CPUC to impose rate regulation on jurisdictionally mixed video calls would inevitably result in the imposition of rates on interstate video calls. State rate regulation of video calls would negate the valid FCC interest in keeping information services free of rate regulation.

The same result applies to other services. Text messages or emails sent to or from remote mobile devices also cannot practicably be separated into intrastate and interstate components and hence are also jurisdictionally mixed. Moreover, the FCC has made clear that texting "will not be subject to *per se* common carrier regulation," and rate setting lies at the very heart of such

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[72] *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking, FCC 21-60, ¶ 247, n.779 (2021) (*2021 ICS Order*).
[73] *2021 ICS Order*, FCC 21-60, ¶ 254, n.803.
[74] *Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People*, Decision Adopting Interim Rate Relief for Incarcerated Person's Calling Services, D.21-08-037, at 75-76 (Aug. 19, 2021).
[75] *Remand Order,* 35 FCC Rcd at 8506, ¶ 56 (citing *Vonage Holdings Corp. Pet. for Decl. Ruling Concerning an Order of the Minnesota Public Utilities Commission,* Memorandum Opinion and Order, 19 FCC Rcd 22404-22405 (2004)).

regulation.[76] Regulating rates for texting would directly negate this federal policy of exempting such services from common carrier regulation and is therefore preempted pursuant to the impossibility doctrine. As the FCC noted, precluding Title II regulation of texting "promotes innovation and investment" whereas "utility-style regulation is not suitable for dynamic technological industries." Innovation "flourish[es] when they are 'subject to the [FCC's] long-standing national policy of nonregulation of information services.'"[77]

State efforts to regulate IPCS services that deliver content such as photos, movies, educational materials, and music, including internet access services, would also regulate interstate services. Although Securus' offering of access to this content does not enable access to the public internet, it is nevertheless an interstate information service. Incarcerated persons accessing this content, typically using tablets, involves retrieving stored information on servers that are generally not located in the same state as the incarcerated person.[78] Securus' storage of accessible content on its servers is much like the "caching," which "involves storing and retrieving capabilities required by the 'information services' definition."[79] Moreover, the ability to retrieve stored content is inextricably intertwined with high-speed transmission so that the consumer perceives a single integrated information service.[80] Securus' offering of access to

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[76] *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Services*, WT Docket No. 08-7, Declaratory Ruling, 33 FCC Rcd 12075, 12089, ¶ 31 (2018) (*Texting Order)*. As the FCC noted, its policy of nonregulation "refers primarily to economic, public utility type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws."). *Id.* at 12101, n.171 (quoting *Vonage Holdings Corp. Pet. For Decl. Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n v. FCC*, Memorandum Opinion and Order, 19 FCC Rcd 22404, n.78 (2004) *aff'd, Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

[77] *Texting Order*, 33 FCC Rcd at 12101, ¶ 49.

[78] Securus' offering is similar to the "walled gardens" offerings of curated content that early internet service providers such as AOL provided and were deemed information services. *See Mozilla Corp*. v. FCC, 940 F.3d 1, 23.

[79] *Mozilla*, 940 F.3d at 22.

[80] *Id.* at 21.

content is clearly an information service, and the CPUC's imposition of rate regulation would again run afoul of the FCC's policy of non-regulation of internet access services.[81]

C. *Mozilla* Does Not Preclude Preemption of the CPUC's Rate Regulation

The CPUC has begun to cite the *Mozilla* case in decisions rejecting preemption arguments.[82] *Mozilla* held that, by having classified broadband internet access service as an information service subject only to Title I of the Communications Act, the FCC lacked express authority to regulate those services and, thus, "equally lacks the power to preempt state law."[83] The FCC had attempted very broad *ex ante* preemption of "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[84]

The court, however, emphasized that it was not addressing preemption of state regulations that actually conflict with FCC's policies because the FCC was not relying on conflict preemption.[85] More generally, *Mozilla* does not disturb the ability of the FCC to rely on *implied* preemption, for example, the impossibility doctrine.[86] In responding to the dissent's

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[81] *See Id.*at 17.
[82] *See e.g., Order Instituting Rulemaking Regarding Emergency Disaster Relief Program*, Order Modifying Decision D.19-08-025, and Denying Rehearing of Decision, as Modified, D.20-09-012 at 20-25 (Sept. 10, 2020) (*Phase I Emergency Order)*; *Order Instituting Rulemaking into the Review of the California High Cost Fund-A Program,* Decision Adopting Broadband Imputation on the General Rate Cases of the Small Independent Local Exchange Carriers*,* D.21-04-005 at 14 (April 15, 2021) (*Imputation Order*).
[83] *Mozilla,* 940 F.3d at 75.
[84] *Id.* at 74 (quoting *Restoring Internet Freedom,* WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, ¶ 195 (2018)). *Mozilla* called this the "Preemptive Directive."
[85] *Id.*at 81-82 (noting the FCC's statement that the Preemptive Directive was broader than conflict preemption, which involves an analysis of specific state laws).
[86] *Id.*at 85 ("[W]e do not consider whether the remaining portions of the [Internet Freedom] Order have preemption effect under principles of conflict preemption or any other implied-preemption doctrine."); *see also New York State Telecom. Ass'n et al. v. James*, -- F.Supp.3d --, 2021 WL 2401338 *9 (E.D.N.Y. June 11, 2021) ("*Mozilla's* holding does *not* preclude or revoke the [Internet Freedom] Order's implicit preemptive effect.").

concern that *Mozilla* was foreclosing preemption based on a policy of non-regulation, the court's majority wrote: "[T]he dissenting opinion's suggestion that the court's decision leaves no room for implied preemption confuses (i) the scope of the Commission's authority to expressly preempt, with (ii) the (potential) implied preemptive effect of the regulatory choices the Commission makes that are within its authority."[87] At issue in *Mozilla* was whether the Congress had expressly delegated authority to the FCC to preempt any and all state authority to regulate the intrastate offering of internet access service.[88]

The CPUC decisions relying on *Mozilla* are inapposite as they did not involve conflict preemption or address core common carriage regulation like setting rates. In the *Phase I Emergency Order,* where AT&T argued that the CPUC's requirements to waive fees for certain information services during declared emergencies were preempted, the CPUC noted that there was no allegation of conflict preemption.[89] The CPUC's rejection of preemption arguments in its *Broadband Imputation Order* is also inapposite. The CPUC there noted that "broadband imputation does not set broadband rates, leaving Small ILECs and there ISP affiliates to freely set retail rates . . . this decision does not infringe on any purported federal jurisdiction."[90] As the FCC noted, its policy of nonregulation of information services "refers primarily to economic, public utility type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws."[91] Here, of course, the CPUC is

[87] *Mozilla,* 940 F.3d at 85.
[88] *Id.* at 80-81 (Rejecting the FCC's effort to "kick the States out of *intrastate* broadband regulation.") (emphasis added).
[89] *Phase I Emergency Order* at 24.
[90] *Imputation Order* at 14.
[91] *Texting Order*, 33 FCC Rcd, at 12101, n. 171 (quoting *Vonage Holdings Corp. Pet. For Decl. Ruling on Order of the Minn. Pub. Utils. Comm'n v. FCC*, Memorandum Opinion and Order, 19 FCC Rcd 22404, n.78 (2004) *aff'd, Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007)).

considering "economic, public utility type regulation" that most directly conflicts with the federal policy of non-regulation.[92]

Any suggestion that *Mozilla* broadly bars the FCC from preempting any state regulation of information services as conflicting with the federal policy of non-regulation would, as *Mozilla* admonished, confuse the express power to regulate with the preemptive effect of the FCC's regulatory choices. Two Supreme Court opinions have upheld the power of federal agencies to impliedly preempt state regulation where the federal agencies have chosen not to regulate. In *Ray v. Atlantic Richfield Co.*, the Court held that the Department of Transportation's decision not to regulate certain operations of oil tankers constituted a ruling "that no such regulation is appropriate," and "States are not permitted to use their police power to enact such regulation."[93] Similarly, in *Arkansas Electric Co-op Corp. v. Arkansas Public Service Comm'n,* the Court noted that a "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate."[94] *Mozilla's* majority declined to follow this precedent only on the grounds that they involved implied preemption, not express preemption.[95]

That *Mozilla* is not an obstacle to implied preemption of a state's effort to impose common carrier regulation over information services was confirmed in *New York State Telecomm. Ass'n v. James*. The case is highly persuasive authority as it involved the state's effort to impose rate regulation for an information service, which there involved broadband internet access service. The court found that the FCC's classification of a service as a Title I information

[92] *Texting Order*, 33 FCC Rcd at 12101, n.171.
[93] *Ray v. Atl. Richfield Co.,* 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 774 (1947)).
[94] *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 384 (1983).
[95] *Mozilla,* 940 F.3d at 83 (distinguishing *Arkansas Electric* and *Ray v. Atlantic Richfield* as "discussing implied preemption").

service constituted "an affirmative decision not to treat it as a common carrier."[96] The state's regulation of rates "conflicts with the implied preemptive effect" of the FCC's decision not to impose common carrier obligations on the service and, thus, "stands as an obstacle to the FCC's accomplishment and execution of its full purposes and objectives."[97] *James* found that *Mozilla* did not require a different outcome because that case did not preclude *implied* conflict preemption based on a federal policy of non-regulation.[98] Faced with a specific state regulation regulating the *rates* of an information service, the court had little trouble finding the state law "conflict-preempted."

The precedent discussed above compels the conclusion that the CPUC's effort to cap rates for video sessions and other services, all of which are information services, is conflict-preempted because it would negate the FCC's policy of nonregulation. Regulating rates is quintessential common carriage regulation that conflicts with the FCC's affirmative decision not to impose such regulation on these services. There is no question that the CPUC's rate regulation would apply to the interstate components of these jurisdictionally mixed services implicating the impossibility doctrine's exception to the states' ability to regulate intrastate services.

CONCLUSION

For the reasons set forth above, Securus respectfully requests that the CPUC defer action on the question of its jurisdiction over video sessions and other services pending the outcome of general rulemaking. Should the Commission address merits of the question in this proceeding, Securus demonstrates that the CPUC lacks statutory authority to regulate these services and would be preempted in any event.

[96] *New York State Telecom. Ass'n et al*., 2021 WL 2401338 at *7.
[97] *Id.* at *8.
[98] *Id.* at *9.

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